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GEOFF FELTOE

# WHY I CAN'T TEACH CUSTOMARY LAW

**Julie E. Stewart**

*Professor, Department of Private Law, Faculty of Law, University of Zimbabwe*

## EXPLAINING THE TITLE

From the outset it is important to note that my inability to teach customary law is not an absolute "can't" but a relative "can't". A more accurate, but less tantalizing, title would have been: "Why I try not to teach customary law within a positivist general law framework".

## TEACHING CUSTOMARY LAW

Historically within law curricula in the Southern African region the bulk of teaching on African customary law has tended to be on the captured and formalised versions that are recorded in the law reports, built upon and interpreted through an Anglo-Saxon or Roman Dutch law procedural and substantive law filter.

A different starting point for devising curricula, is that customary law is a dynamic living system that has the capacity to enrich and inform the other systems of law with which it interacts within a given legal system. This requires a pedagogic approach that investigates the jurisprudence of custom. It postulates that customary law should be approached as a system of cohesive laws with underlying guiding principles that need to be identified, recognised as a source of jurisprudence, their content sensitively explored. It is to this latter approach that I have come to subscribe.

Thus whether or not I can teach customary law has become a matter of the content of what is to be taught and the sources from which that content is drawn. If the content is to be the positivist versions of customary law as captured in the textbooks on customary law and the precedents in the law reports, then I am ethically bound to critique it at every turn. I can teach it in the technical sense, arguably that is a relatively easy task as it is pre-digested, ordered and homogenised as a coherent set of hierarchical rules, usually arranged in accordance with pre-existing general law subject divisions. It is frequently presented as a sub-class of general law, either within specific subject areas such as Family Law, Delict, Property Law and Succession Law or as a single subject, Customary Law. In this version the relevant legislation, choice of law rules, procedural issues and substantive law "rules" teased out of the cases, across the whole gamut of recognised customary law topics, are addressed. There is, increasingly, less of this version of customary law to teach. Legislative intervention is consistently intervening in the construction of customary law to the point where if the matter is to be adjudicated in the courts it may well be regulated by statute, which by its very nature ceases to be customary even if it is a statute regulating or amending customary law.<sup>1</sup> So that a focus on this as African Customary Law is a misnaming of the

<sup>1</sup> The customary law (in the books) of inheritance in Zimbabwe, which forms the backdrop to this paper, has since been significantly changed by legislative intervention. The Administration of Estates Amendment Act 6 of 1997, now prescribes how the intestate estates of persons to whom customary law is applicable shall be distributed. In general it is a reflection of the principles that underlie local customs and practices. However, it is no longer customary law but statute. It is instantly ossified law.

content of the law as once legislation intervenes the content is general law.<sup>2</sup> Just as I can teach the Zimbabweanised Roman Dutch Law of Succession, so I could teach the "Roman Dutchised" Zimbabwean Customary Law of Succession, but it is not a version which accords with the customs and practices of the peoples of Zimbabwe. However this all begs the question as to what it is that ought to be taught.

### THE NEED TO RESEARCH CUSTOMARY LAW

Reconsidering the thrust and content of syllabi for the teaching of customary law has its origins in the research into, and reconsideration of customary law as a dynamic living system of law that affects the lives of the majority of the population of Zimbabwe. Even where the general law is purportedly applicable in family, inheritance, land, environmental or other matters it is trite that the direct or indirect influence of local customs and practices affects the way in which such matters will be resolved (Dengu-Zvobgo *et al*; Ncube and Stewart, 1995).

S1 of the Zimbabwe, Customary Law and Local Courts Act defines "customary law" as:

[t]he customary law of the people of Zimbabwe, or any section or community of such people, before the 10th of June, 1891, as modified and developed since that date.

Although the first part of the definition seems to refer to an ossified version of custom for which it would be difficult to obtain an accurate version of its 10th of June 1891 content, there is room for recognition of customs oft stated dynamism. In fact the section demands research into the development and modification of customary law since 1891. In other words there is a need to re-examine custom as an internal exercise as well as an external exercise.

National constitutions, legal systems and the mode and extent of the recognition of customary law create their own considerations of how customary law should and can be addressed as a system of law.

S89 of the Zimbabwe Constitution provides for the recognition of customary law, the effective extent of such recognition being regulated by other statutes, as is the purported content of the customary law to be applied by the courts. The current recognition statute, the Customary Law and Local Courts Act, Chapter 7:05, provides for the application of customary law as follows:

s3 Subject to this Act and any other enactment, unless the justice of the case otherwise requires -

- a) customary law shall apply in any civil case where -
  - i) the parties have expressly agreed that it shall apply; or
  - ii) regard being had to the nature of the case and the surrounding circumstances, it appears that the parties have agreed that it should apply; or
  - iii) regard being had to the nature of the case and the surrounding circumstances, it appears just and proper that it should apply;
- b) the general law of Zimbabwe should apply in any other case . . .

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However, it is reasonable to assume that many estates or substantial portions of estates will continue to be dealt with by families outside the bounds of the statute.

- 2 It might be argued that my agenda will be overtaken by legislative intervention, even if this is to be the case the nature and form of legislative intervention needs to be informed by a thorough understanding of what is to be reformed. Arguably a thorough understanding and reinterpretation of custom might obviate legislative change.

There are also statutes which prescribe that customary law or the customs and practices of the tribe or people to which a person belonged should govern a particular matter. Such as s68 of the Administration of Estates Act, Chapter 7:05;<sup>3</sup> the Customary Marriages Act, Chapter 5:07; s12 of the Wills Act, Chapter 6:06; s8 of the Communal Land Act, Chapter 20:04.

The processes to be followed in determining the content of customary law are prescribed by statute as with s9 of the Customary Law and Local Courts Act, Chapter 7:06:

If a court entertains any doubt as to the existence of or content of a rule<sup>4</sup> of customary law relevant to any proceedings, after having considered such submissions thereon as may be made and such evidence thereof as may be tendered by or on behalf of the parties, it may without derogation from any other lawful source to which it may have recourse, consult reported cases, text books and other sources, and may receive opinions, either orally or in writing to enable it to arrive at a decision in the matter . . .

The section is worded sufficiently broadly to permit the review of the content of custom. Thus it can be argued that the Zimbabwean unified legal system is suitably constructed for a thorough review of the nature and form of one of its major component systems of law, customary law.

### CUSTOMARY LAW REFORM: AN INSIDER JOB?

Putting customary law through the constitutional sieve, that is determining whether it measures up to the criteria stipulated in Bills of Rights is one way to reform customary law (Bennett, 1995). However it still remains a reform of the customary law on the books. In the Zimbabwean context even this is not possible as customary law is a protected species. S23 of the Zimbabwean Constitution, as recently amended by s9 of Act 14 of 1996, provides that there may not be discrimination in any written law or by a public authority on the grounds of race, tribe, place of origin, political opinion, colour, creed or gender, except where such is necessary by reason of physiological difference between the genders.

The relevant portions of s23, as amended, provide:

- (1) Subject to the provisions of this section —
  - (a) no law shall make any provision which is discriminatory either of itself or in effect; and
  - (b) no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority . . .

However, this does not provide a basis for putting customary law through the constitutional sieve and ridding it of its supposed discriminatory elements as s23(3) provides:

Nothing contained in any law shall be held to be in contravention of subsection of (1)(a) to the extent that the law in question relates to any of the following matters —

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3 This section has now been replaced by the provisions of s3 of the Administration of Estates Amendment Act 6 of 1997. A discussion of the effect of this amendment lies well beyond the scope of this paper.

4 Rule may have been an inappropriate word to use in this context, the preferable word would probably have been principle of customary law. (Rwezaura *et al*, Stewart, 1997 (Methodology). It has been postulated that rule collection may have been a significant source of misconstruction of custom in that the end rules from general principles were collected rather than the underlying principles (Dengu Zvobgo *et al*).

- a) adoption, marriage, divorce, devolution of property on death or other matters of personal law;
- b) the application of African customary law in any case involving Africans or an African and one or more persons who are not Africans where such persons have consented to the application of African customary law in that case . . .
- f) the according to tribespeople to the exclusion of other persons of rights and privileges relating to communal land.

If customary law is to be reformed or revisited within the existing Zimbabwean constitutional and legal frameworks, using constitutional provisions is not the way, at present. Clearly other modes have to be found and, to some extent, this was a driving force behind the reconsideration of the content and form of customary law as a potentially dynamic part of the legal system which could be the source of its own transformation.

As a Women and Law in Southern Africa (WLSA) and Women's Law researcher, my entry point into this terrain is determined by having to make grounded appraisals of women's experiences of the different versions of customary law and how these assist or hinder them to access resources (Ncube *et al*, 1997 (b)).

After some preliminary forays into the field and analysis of findings, it seemed clear that at least some of the customary law on the ground as used among the people was, surprisingly, consistent with notions of gender equity. So from the initial stages of the research process it was clear that this was a research and reform agenda that would bear fruit. There was also an appreciation that even if certain customs were problematic, at the very least one, we would have an understanding of the social and cultural milieu to be addressed if reform was to take place in accordance with human rights paradigms (Tsanga, 1997).

## OLD PRINCIPLES; NEW SOLUTIONS

The underlying hypothesis in this paper is that customary law as captured and applied in the formal legal system began as little more than a collection of end result determinations as pronounced by tribal authorities or as generalisations about outcomes at the level of rules recounted to early researchers (Rwezaura *et al*, Armstrong *et al*). This hypothesis incorporates the notion that what may have been missed in these collection processes are the underlying social values that translate into general guiding principles that informed the decision making processes of traditional judicial authorities (Dengu-Zvobgo *et al*). There has been a great deal written about those old collection processes and about the dynamism of custom, but often the critiques stop at that point (Bennett, 1995). These critiques have to be transformed into research into the development of customary law at all levels, be it the courts, state administration, or the versions current among the people. The findings from such research have to be turned into legal action. Students cannot be treated as the end consumers of the research product, they have to be skilled in doing, case by case if necessary, their own research into customs and practices on the ground.

## RESEARCH, DIALOGUE AND REFORM: AN ILLUSTRATION

A meeting in 1996 with chiefs, from different provinces and ethnic groups in Zimbabwe, Ministry of Justice officials and women's organisations to discuss proposed amendments to the laws of inheritance in Zimbabwe illustrates the importance of sound background research into the jurisprudence that underlies custom. The resolution of the discussion and the form that any amendments to the law might take turned on whether there were underlying principles that guided determinations in inheritance disputes or whether there

was an irrefrangible rule that the eldest son was his father's heir as held by the Supreme Court in cases such as *Mudzinganyama v Ndambakuwa* S-50-93.

The President of the Council of Chiefs and Member of Parliament, Chief Mangwende, when asked whether there was the underlying principle of customary law in inheritance matters replied that the overarching principle was that the family of the deceased especially wives and children, but not excluding husbands, had to be provided for from the property previously within the command of the deceased person. There was universal agreement among the Chiefs present on this principle regardless of ethnic group. Where the difference lay was in the way that this could be accomplished.

Chief Mangwende saw the way in which this could be carried out was by leaving the property in the hands of the surviving spouse. A married couple, regardless of the form of the marriage, were, in his view, a productive unit and there was no notion of division until after the surviving spouse had died. Formal status would be transmitted to the eldest son but the property and its daily management should remain with the surviving spouse, in this context the wife. There was an elderly chief, from the Gweru area, who could not accept that a woman would have the necessary managerial capacity and skills to carry out the tasks required. His view was that a son or a male relative needed to be in general control. However, even in his case the underlying principle was not disputed, it was the mode of its accomplishment that was in dispute. The rest of the chiefs, some 12 in all, subscribed to Chief Mangwende's approach to the matter but with room for variation depending on specific family situations.

The principle had remained static. The best interests of the remnant family of the deceased person predominated, but the manner of its realisation was subject to constant pragmatic variation. The end result determinations are therefore likely to be different from era to era and place to place but this does not disturb the principle.

Asking what was the principle behind customary inheritance practices was a calculated risk. However, it was one that was informed as to the likely response to the question. Suffice it to say that this turned the tide of the meeting which was at risk of being bogged down in a plethora of demands for reform from the women and a cultural defensive stand from the men. The meeting then, to the surprise of many, redivided its alliances into women's organisations and the chiefs on one side and the "other" men defending patrilineal end rule oriented views of women's inheritance rights on the opposing side. This redivision proved critical in achieving reforms of the law that affirmed women's acknowledged customary entitlement to significant rights in their deceased husbands' estates.<sup>5</sup> The battle had been being waged on a number of fronts — one to transform the interpretations of customary law through the superior courts, the second to improve women's lot through legislative intervention.<sup>6</sup> The latter came first and was not to be quibbled over because of the significant benefits conferred on widows. However, it is now an uncustomary reflection of customary principles.

In the empirical data generated by the WLSA research into inheritance there are similar examples that illustrate this principle versus rule construction of customary law. Families, chiefs and ordinary individuals in rural and urban Mashonaland and Matabeleland, stated that the care and protection of the family of the deceased person was at the centre of

5 See S3 of the Administration of Estates Act, Amendment Act 6 of 1997.

6 The legislative intervention does not obviate the need to further explore customary law in this area as there will still be estates to be handled and fought over that are governed by the previous law.



customary practices of inheritance. In Nkayi in Matabeleland it was stressed that the surviving spouse remained in control and possession of the family land allocation for their own benefit, that cattle would be made available to a widow for her own use. Cattle and other movable property, once the needs of the spouse had been satisfied, would be distributed in different proportions to the children according to need and according to whether they had received previous allocations of resources on marriage or for other purposes.<sup>7</sup> The youngest son of a deceased male might take over the duty of assisting his mother and seeing to her daily needs. The eldest son would inherit his father's status and overall responsibility for the family, but not the land allocation which would ultimately pass to the youngest son. If the union was polygynous then it was the youngest son of the respective houses who would acquire the responsibility for assisting his mother and the eldest son of the most senior house would probably become the heir to his father's status<sup>8</sup> (Dengu-Zvobgo *et al*, 1994).

The Zimbabwe Supreme Court held in *Vareta v Vareta* S-126-90 and later in *Mwazozo v Mwazozo* S-121-94, reversing the decision in *Chihowa v Mangwende* S-84-87, that a daughter cannot inherit from her father's intestate estate under either Ndebele or Shona customary law. However, both Ndebele and Shona custom, on the ground, is far more pragmatic.

One of my neighbours died and was survived by only female children. We distributed his many cattle and other property among his daughters. The brothers and other close relatives of the deceased decided on this and the rest of us and the community had no problems with it as it is our custom — Headman Muziwapansi, Nkayi district, Matabeleland (Dengu-Zvobgo *et al*, 1994).

In Bulawayo urban areas a discernible trend was for the family to try and arrange for the family home to be transferred to the surviving widow. This was usually not problematic until the matter was to be dealt with by the courts where the formal pronouncement would be made that the eldest son was the heir. Even where this took place, the son might be prevailed on to transfer the property to his mother. This was explained as being in accordance with custom.

In Mashonaland similar pragmatic processes were uncovered, where intestate heirs to commercial immovable property, appointed according to the provisions of S6A of the Customary Law and Primary Courts Act,<sup>9</sup> tried as far as possible not to disturb the occupation rights of widows, leaving them in occupation and control of commercial land holdings. Chief Mazungunye from Bikita interviewed during the field research stated that:

the essence of custom was to care for the family of the deceased, using the land or whatever resources were available ... Thus the appointment of the heir, if one was to be appointed, had to focus on the welfare of the family rather than on some predetermined formula (Dengu-Zvobgo *et al*, 1994).

Local customs and practices were, when applied in accordance with the underlying principles of customary law, not necessarily inimical to the rights of women. Rather, they were already in advance of the reform agendas.

7 This is a good example of the fairness and equity principle among children. There is also a marked similarity to the Roman Dutch principle in inheritance matters of collation so as to ensure equitable distribution of an estate among the children of the deceased.

8 Although it was pointed out that each family did things slightly differently, the principle remained firm.

9 S6A was later incorporated as s7 into the Customary Law (Application Act) Chapter 8:05. This act has since been repealed by s10 of the Administration of Estates Amendment Act.



## EXPLORING LEGAL PLURALISM IN THE COURTS

It is argued in this paper that there is a need to develop students research and analytical skills so that they can be part of the re-discovery and re-conceptualisation of customary law and its jurisprudence. However, a word of caution. It must not be assumed that rediscovery processes will always yield satisfactory results; customs and practices have their inherent weaknesses and flaws. But at least an overarching jurisprudential approach broadens the scope for dialogue around both the "good" and the "bad" elements.

One research and analysis technique to be employed is to make internal comparisons of customary law norms between the higher and lower courts (Dengu-Zvobgo *et al*, 1994). Field research revealed that Magistrates courts which are charged with administering the intestate estates of deceased "Africans" frequently had a broader and more pragmatic approach to the distribution of such estates than the Supreme Court. Magistrates hearing disputes in terms of the then s69 of the Administration of Estates Act, Chapter 301, through their discussions with the families of the deceased person were alive to the nuances of local Customary Law and would make similar determinations to those outlined above. On some occasions these decisions were reversed on appeal by the Supreme Court in favour of eldest sons. However, there is evidence that many of these distributions were happily accepted by families and not appealed. It was also evident that the Magistrates continued to apply the local customs and practices.

The Supreme Court continues to employ a constructed version of custom that has been built up through precedent and has not re-engaged with custom on the ground even though the customary law application and ascertainment statute makes it possible for this to take place.<sup>10</sup> However, it rarely takes place. The Supreme Court merely looks to what the precedent system has constructed as the customary law (Dengu-Zvobgo *et al*; Zim, 1994; Stewart and Ncube, 1997).

The data that was emerging from court determinations alone raised questions as to the nature, form and content of the customary law. The crucial question then became whether the customary law as applied by the superior courts is an authentic version of custom that merits the authoritative treatment it receives? Was it an historical anachronism, ossified and inappropriate or perhaps a distorted creature that the senior judiciary applied for want of available alternatives.

## LEGAL PLURALISM: A CRITICAL METHODOLOGICAL APPROACH

The convergence of research, analysis and teaching made it impossible to avoid the pervasiveness of legal pluralism and the significance of the reglementary power of semi autonomous social fields in inheritance matters (Falk Moore, 1983). A research and teaching framework based on legal pluralism means that multiple skills had to be developed for our own use and then transferred to students. This framework combined normative analysis of the law, both general law and the formal aspects of customary law, and anthropological techniques in uncovering the customary norms at the level of the people. How these norms operated and were influenced by and influenced the law in its formal operation also had to be explored.

10 See the discussion earlier in this paper on s9 of the Customary Law and Local Courts Act, Chapter 7:05.

Procedural issues, it transpired, had to be considered simultaneously with those of the substantive content of custom as it operated on the ground. The composition of decision making bodies within families was of critical importance as were the composition of chief's *dares*. Women's voices, although muted, were not absent from such councils. The role of *vatete*, in Shona societies, was critical at all stages of inheritance decisions. Such women were often the source of family genealogies, and had the last word if not the final decision when it came to how estates should be divided and allocated. The same could be said of women in Ndebele societies.

Time frames for decision making were often protracted, especially in inheritance matters, with time for negotiation and exploration of options. A year's moratorium between a death and a *kurova guva* ceremony or *umbuyiso* ceremony, at which distribution of substantive property and future plans for the widow were made, gave time for informed and careful decision making. What emerged from this procedural investigation was confirmatory evidence of the underlying concerns of these bodies for the remnant families of the deceased.

Apart from the juxtaposition of various official and formal versions of customs and practices, such as those advanced by the chiefs, there is a need to conduct a more broad based enquiry into the functioning and operation of customs and practices on the ground. A truly gender sensitive approach to the research process is a necessary prerequisite in uncovering customary jurisprudence. The next question technique and exploring the values that inform decisions is critical if an understanding of how customs and practices are shaped is to be realised. Likewise it is not enough to unpack just the content of custom. The procedural aspects, who participates in decision making, how decisions are made, are all vital elements in the reconceptualisation and reinterpretation process.

## VALUES, NORMS — CUSTOMS, PRINCIPLES

One of the major criticisms of the earlier collections of customs was that the sources were elderly males in positions of power who colluded with the colonial governments and missionaries to exclude women and young males from power and resources (Chanock, 1985; Rwezaura *et al*; Armstrong *et al*). Current attempts to re-view custom from a grounded perspective must avoid the possibility of similar criticisms and cast more widely for versions and interpretations of custom. As Holleman recounts, the official versions of custom may not accord with the actual application of the principles of customary law on the ground (Holleman, 1973). Thus it is important to uncover the actual practices in the field, especially as they affect women. Interviews with persons who had experienced inheritance problems and inheritance non-problems generally triangulated with the views that were expressed by the chiefs and other local figures. Women's ways of manipulating the system and the processes also spoke to the entitlements women have and their ways of accessing them. Women's entitlements did not fit into the Hohfeldian rights framework but this did not make them any the less rights that were enforceable (For a fuller discussion of this see Stewart, 1997; Mbatha, 1997).

However, it is not of itself sufficient merely to allege that a few interviews indicate that customs and practices have developed or evolved in a particular direction. There needs to be a systematic process through which the reconceptualisation of customary law is explored and its jurisprudence charted. Finding ways to triangulate the results from different sources in the field and build up holograms of customs and practices and their reflection of general principles is a key part of the new approach to teaching customary law. As each finding triangulates with the other perceptions and understandings of customs a hologram is built

piece by piece from local values, through their translation into norms, practices and procedures and on into the more pervasive principles that imbue customary law and shape its jurisprudence.

Individuals when "cross examined" on issues around inheritance would describe what they considered from a cultural and family position to be important. Whether these same values emerged at the level of normative orderings of civil society was the next quest. If communities told you that "in our culture" for example the welfare of the wife and children in inheritance is paramount, this might be described as a value. If families, as a matter of practice, consistently administered estates in favour of women and children then the value was translated into action as a custom or a norm. In such situations community values were triangulating with norms and custom.

The next investigation was to determine whether further up the chain of adjudication within the customary frameworks it was possible to identify such values and norms at the level of principles that governed dispute resolutions. Chiefs, as discussed above, when asked how they would determine such issues, or had done so,<sup>11</sup> indicated that the primary concern was for the welfare of the children in particular and for the wife or wives of a deceased man, or in the case of a woman for the children and the husband. Likewise Magistrates at the lower end of the judicial scale, in constant touch with local customs and practices, were also responding to the principles of customary law that were located within the community.

Importantly this was not just a few random findings but a whole process of triangulated findings as to the underlying principles of customary law across a wide spectrum of society and from different decision making fora. To continue uncritically teaching the Supreme Court's version of the customary law of inheritance, or for that matter without further research in any area of customary law, would be unsupportable.

## TEACHING CUSTOMARY LAW?

This paper thus proposes that what ought to be focused on in teaching "Customary Law" are the methodologies to assist students, the future researchers and practitioners to transcend the rule bound versions of custom. An understanding of the gap between the customary law in the books and the dynamic situation, sensitive versions of customs and practices that were found among the people, also needs to be fostered. Students need to know how to broaden the parameters of the debates about custom with traditional leaders and the community at large beyond the oppression discourse to that of values. This is a liberating debate for all parties, as when the social value or customary principle is raised it is possible to ask: "How would you deal with the needs of the family under particular circumstances?" What if there is no son? What if the widow works in town and the couple had acquired the house together in an urban area?" The next question technique is pursued with the confidence and an informed dialogue conducted.

Calculating the risk, which at the time was a very significant risk, of asking the Chiefs, what was the relevant principle of custom in inheritance matters was possible because there was a background of knowledge and concomitant courage to dialogue, built up through an alternative construction of customary law to that in the minds of the Ministry of Justice Officials. This is also a useful skill in the event that there is resistance to necessary

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11 This needed to be posed as a hypothetical question as Chiefs did not have jurisdiction in such matters. However, that they would intervene in matters was common knowledge. Thus it was a concrete hypothetical question.

transformative reforms of customary law and dialogue with the wider society is needed to "market" the reforms.

## FINDING THE GATEWAYS

Having traversed the empirical field the next methodological challenge becomes to channel the findings at their various levels back through the gateways of the law, into the courts, into the law reform processes and into the "textbook" constructions of the Customary law (Dengu-Zvobgo *et al*, 1994). It is here that the teaching has to re-engage with the field of "law games", while at the same time ensuring that the open ended frameworks remain and that principles are the focus of the research process not ossified end product rules.

Students need to be guided in the process of constructing the arguments to present to the courts, the legislators and administrators as to why these new interpretations of customary law have credence and should and can displace the old ossified versions. At the level of formal "law games" identifying the legislation that allows for the admission of customary law is a key task. Further, the parameters for its admission have to be investigated and the skills to cast the admission and content arguments in appropriate formats have to be actively taught.

## CONCLUSION

Thus although in my teaching I cannot ignore the ossified Customary Law in the books I am compelled to go beyond those versions and explore the underlying principles in the customs and practices of a people. Such an approach must also contain a section on the development of critical skills in the analysis of the customary law in its many locations and guises.

## BIBLIOGRAPHY

- Armstrong *et al.* (1993) "Uncovering Reality: Excavating Women's Rights in African Family Law", in *International Journal of Law and the Family*, 7 (1993), 314-369.
- Bennett, T.W. (1995), *Human Rights and African Customary Law*, Juta, Cape Town.
- Chanock, M. (1985) *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia*. Cambridge: Cambridge University Press.
- Dengu-Zvobgo *et al*, (1994), Dengu-Zvobgo, K.C., Donzwa, B.R., Gwaunza, E.C., Kazembe, J.L., Ncube, W., Stewart, J.E., *Inheritance in Zimbabwe: Law, Customs and Practices*, SAPES Trust, Harare.
- Falk Moore, S. (1983) "Law and Social Change. The Semi-autonomous Social Field as an Appropriate Subject of Study". Chapter 2 in *Law as Process: An Anthropological Approach*. London: Routledge and Kegan Paul.
- Holleman, J.F. (1973) "Trouble-cases and Trouble-less Cases in the Study of Customary Law and Legal Reform", in *Law and Society Review* 7 585-609.
- Mbatha L. (1997), Customary Land Allocation Processes Which are not Incompatible with the Constitution, Seminar Paper, African Gender Institute Associate Programme Seminar Series, University of Cape Town, June 1997.
- Ncube *et al*, (1997(b)), Ncube, W., Stewart, J.E., Dengu-Zvobgo, K.C., Donzwa, B.R., Gwaunza, E.C., Kazembe, J.L., *Paradigms of Exclusion: Women's Access to Resources in Zimbabwe*, WLSA, Harare, 1997.
- Ncube *et al*, (1997(a)) Ncube, W., Stewart, J.E., Dengu-Zvobgo, K.C., Donzwa, B.R., Gwaunza, E.C., Kazembe, J.L., *Continuity and Change: The Family in Zimbabwe*, WLSA, Zimbabwe, Harare, 1997.

- Ncube, W. & Stewart, J. (eds) (1995) *Widowhood, Inheritance Laws, Customs and Practices in Southern Africa*, WLSA, Harare, 1995
- Rwezaura *et al*, (1995) Rwezaura, B., Armstrong, A., Ncube, W., Stewart, J., Luteka, P., Musanya, P., Casimiro, I., Mamashela, M. "Parting the Long Grass: Revealing and Reconceptualising The African Family", *Journal of Legal Pluralism and Unofficial Law*, No 35/1995.
- Stewart, J. (1997), *Rights, Rights, Rights: Women's Rights? Reconceptualising and Reconsidering Rights*. Paper presented at the African Gender Institute, Associate Seminar Series, University of Cape Town, June, 1997.
- Stewart, J. & W. Ncube (1997) *Standing at the Cross Roads: WLSA and the Rights Dilemma, Which Way Do We Go?* (WLSA, Working Paper, Harare, 1997).
- Tsanga, A., (1997), *Taking Law to the People: Experience of Zimbabwe* DPhil Thesis, University of Zimbabwe.
- Weis Bentzon *et al* (1997), Weis Bentzon, A., Hellum, A., Stewart, J., Ncube, W., Agersnap, T., *Pursuing Grounded Theory: The Women's Law Experience*, forthcoming.



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